

The Evolution of the Political Offense Exception in an Age of Modern Political Violence

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The United States is party to ninety-six extradition treaties,¹ each of which specifies that no obligation exists to extradite an individual for an act that constitutes a political offense.² Born of the experience of the Enlightenment,³ this doctrine has become known as the “political offense” exception. The exception allows countries to remain neutral in foreign conflicts, at least to the extent of declining to deliver participants into the hands of their enemies.

The courts are charged with an initial determination of whether the exception applies in particular cases. United States courts have not inquired into the legitimacy of the foreign government requesting extradition.⁴ They have, instead, sought to determine whether the individual’s

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1. International extradition is defined as the act by which one nation surrenders an individual who is present within its territory to another nation that has charged or convicted the individual for the commission of a crime within its territorial jurisdiction. The duty to extradite only arises pursuant to express treaty provisions. J.B. MOORE, A TREATISE ON EXTRADITION AND INTERSTATE RENDITION 3-5 (1891).

For a list of the 96 nations which are parties to bilateral extradition treaties with the United States, see 18 U.S.C. § 3181 (1982).

2. The standard formulation of a political offense exception is exemplified in the extradition treaty between the United States and the United Kingdom, which provides:

Extradition shall not be granted if:

(i) the offense for which extradition is requested is regarded by the requested Party as one of a political character; or (ii) the person sought proves that the request for his extradition has in fact been made with a view to try to punish him for an offense of a political character.

Treaty of Extradition, June 8, 1972, United States-United Kingdom, art. 5, sec. 1, 28 U.S.T. 227, T.I.A.S. No. 8468.

3. See, e.g., J. LIVELY, THE ENLIGHTENMENT (1966). Before the development of the political offense exception, the primary purpose of extradition had been to facilitate the apprehension and punishment of political dissidents. Medieval overlords used extradition more as a device to retrieve their political enemies than as a means to bring ordinary criminals to justice. Enlightenment thinking and the revolutionary upheaval of the eighteenth and early nineteenth centuries were significant factors leading to change in the doctrine and practice of extradition. Emergence of constitutional government from the American and French revolutions broadened concern for individual liberty and tolerance of rebellion against unjust regimes. States thereafter began to recognize a duty to grant asylum to political dissidents. Thus, by the nineteenth century, the international community had renounced extradition as a permissible means to suppress political opposition. See generally, Sutherland, *The Development of International Law of Extradition*, 28 ST. LOUIS U. L. J. 33-35 (1984).

4. Indeed, such an inquiry would be patently beyond the legitimate scope of judicial inquiry and could be assessed, if at all, only by the executive branch of the United States govern-

commission of a violent act is related to a larger pattern of political conflict. This mode of inquiry has become known as the "incidence test."

The major problem in relying on this incidence test grows out of changes in the nature of political violence. First, there has been a significant increase in the incidence of violent opposition. This increase in violence is exacerbated in international terms by enhanced mobility enabling more opposition forces to reach foreign jurisdictions.⁵

Second, the nature of opposition activity has changed. Violent opposition is now as likely to focus on non-governmental as governmental targets. Not only government officials but also landowners, business leaders, and often ordinary citizens become the targets of political violence. This violence may be conducted outside the borders of the nation against representatives of either a regime or a social order. Generally referred to as terrorism,⁶ this type of violence differs from the historical pattern of "rebellion" on which the jurisprudence of the political offense exception is based. The incidence test, however, has failed to meet this change in the pattern of political action by not providing a workable distinction between terrorism and political rebellion.

In tracing this ambiguity in the law, this Article traces the historical development of the political offense exception, showing how this international norm has been applied in different national jurisdictions. Contrasts among British, Swiss, and French law are made and each is compared with the United States version of the political offense exception. This Article argues that the ambiguous distinction between rebellion and terrorism has complicated the application of the political offense exception. As a result, a fundamental tension exists between the goals of

ment. See, e.g., *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1963); *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972) *reh'g denied* 409 U.S. 897 (1973).

5. See, e.g., Lauter, *There's No Place to Hide: Extraditions Have Tripled, and It's Only the Beginning*, 7 NAT'L L. J. 1, col. 1 (Nov. 26, 1984).

6. There is no standard definition of "terrorism," and the various formulations are subjects of intense controversy. See, e.g., Lubet and Czackes, *The Role of the American Judiciary in the Extradition of Political Terrorists*, 71 J. CRIM. L. & CRIMINOLOGY 195, n. 17 (1980). Some commentators have suggested that the definition is inherently circular. See, e.g., Schwarzenberger, *Terrorists, Guerrillas, and Mercenaries*, TOLEDO L. REV. 71, 72 (1971). As used in this article, terrorism refers to violence against private individuals and groups not directly responsible for the actions of the government. This definition does not preclude treating acts of governments as terrorism against their own citizens. See, e.g., U.N. Rep't of the Ad Hoc Comm. on Int'l Terrorism, G.A.O.R. 28th Sess. Supp. 28 [A-9028] at p.15.

One definition of terrorism notes that there are three characteristics of terrorism: a violent, criminal act; toward an impersonal target; with a motive of striking widespread fear (terror) within the community. One must distinguish whether the "nationalistic struggle for self determination and revolutionary theory" is a spur to the acts or a rationalization for them. NAT'L ADVISORY COMM. ON CRIM. JUSTICE STANDARDS AND GOALS, DISORDERS AND TERRORISM 3, 22 (1976).

Political Offense Exception

preserving neutrality in foreign conflicts and of deterring transnational terrorism. This Article proposes a new functional test to modernize the incidence test. This new test reconciles neutrality and anti-terrorist goals in a manner consistent with the courts' refusal to inquire into the legitimacy of the foreign government requesting extradition.

I. Overview of the Political Offense Exception

The political offense exception removes the obligation to extradite when the actions for which the individual is being charged are part of a course of conduct associated with general political offenses such as treason, sedition, or espionage. Although the specific actions charged may be criminal offenses such as murder or arson, they are rendered political by virtue of the context in which they occur.

In analyzing the context of the action, courts have recognized both "pure" and "relative" political offenses.⁷ The distinction, which has never been absolute, is based on consideration of the target and the means used. A pure political offense is defined largely in terms of its target — government officials or the regime of official power. The relative political offense has elements of a common crime, perpetrated in a political context, and may be directed at non-governmental as well as governmental targets.

The relative political offense exception raises the problem of defining "political." The courts are now confronted with a virtually unbounded concept of the political as individuals or groups use violent means against a wide range of targets to serve political ends. The theory of the political offense exception has not yet adequately incorporated these changes in targets and means.

A completely unbounded concept of the political offense would destroy the system of international extradition. The challenge is to develop a standard that distinguishes between contemporary political action and terrorism. Courts have tended to base this distinction on unspecified assumptions which imply that factors of political expedience or other standards are taken into account. As a result, the goal of neutrality has been undermined by according primacy to the goal of preventing terrorism. The danger in this approach is that the concept of terrorism will become so expansive that it becomes merely a code word for actions that are inconsistent with the momentary foreign policy positions of the state acting on the request for extradition. The political offense exception would

7. See Banoff & Pyle, "To Surrender Political Offenders": *The Political Offense Exception to Extradition in United States Law*, 16 N.Y.U. J. INT'L L. & POL. 169, 178 (1984).

no longer serve to preserve international neutrality and to protect individual rights, but would instead become merely one more foreign policy tool in the hands of governments.

II. Origin of the Incidence Test in the English Common Law

The British approach to the political offense exception can be traced to *In re Castioni*.⁸ That case involved the Swiss government's extradition request for Angelo Castioni, a Swiss national accused of fatally shooting a government official. Castioni admitted the shooting but claimed exemption under the Extradition Act of 1870,⁹ which forbade extradition for acts of a "political character" while leaving the term undefined.¹⁰ The shooting had occurred during a political disturbance in the canton of Ticino. Citizens in the town of Bellizona had for some time been dissatisfied with the political party controlling the government. They revolted when that party refused to revise the Ticino constitution upon the petition of 7000 citizens as required by that constitution. The townspeople seized the local arsenal and stormed the town palace. Castioni was among the first to enter; he shot a government official who had offered no active resistance.

The Queens Bench found that Castioni had committed an offense of a political character. In reaching its decision, the court adopted the "incidence test." The test requires that an act be perpetrated in the course of and in furtherance of a widespread political uprising;¹¹ hence, the test requires that a court inquire into the circumstances surrounding an offense.¹² Though perhaps inconsistent with the outcome of the case, the court emphasized that an act satisfies the test only when it is in furtherance of a political uprising rather than merely incidental thereto.¹³

8. [1891] 1 Q.B. 149.

9. Extradition Act of 1870, 33 & 34 Vict., ch. 52.

10. The Extradition Act of 1870 provides in relevant part:

A fugitive criminal shall not be surrendered if the offense to which he is surrendered or demanded is one of a political character or if he proves to the satisfaction of the police magistrate or the court before whom he is brought on habeas corpus, or to the Secretary of State that the requisition for his surrender has in fact been made with a view to try to punish him for an offense of a political character.

Id.

11. *Castioni*, at 156.

12. *Id.* at 155 (Dennan, J.):

[I]t is [not] necessary or desirable that we should attempt to put into language the shape of an exhaustive definition exactly the whole state of things or every state of things which might bring a particular case within the description of an offense of a political character.

13. *Id.* at 155, 165. Justices Dennan and Hawkins explicitly rejected an interpretation of the Extradition Act of 1870 proposed by John Stuart Mill implying that any act occurring during a political uprising may be a political offense irrespective of the perpetrator's object and

Political Offense Exception

The Queen's Bench elaborated on the incidence test in *In re Meunier*.¹⁴ Meunier was an avowed anarchist sought by the French government for the bombings of a Parisian cafe and a military barracks. Two people were killed in the cafe attack. Meunier challenged the sufficiency of the evidence linking him with the cafe bombing and asserted that the bombing of the military barracks was an offense of a political character under the Extradition Act of 1870.¹⁵ Justice Cave rejected Meunier's assertion and declared that the incidence test requires the existence a political uprising in which two or more factions vie for control of the government. Accordingly, random violence of the type used by an anarchist could never constitute a political offense since it does not further the interests of a faction.¹⁶

Together, *Castioni* and *Meunier* delimit the political offense exception where violence has been committed with a political purpose. The Extradition Act, however, also disallows extradition when the request is made "with a view of trying or punishing them for an offense of a political character."

In *Ex parte Kolczynski*¹⁷ the Queen's Bench interpreted this to authorize the courts to inquire into the motive of a state requesting extradition. *Kolczynski* involved the seizure of a Polish fishing trawler by a group of its crewmembers. The vessel had been part of the Polish fishing fleet in the North Atlantic on which a party secretary "was stationed to monitor loyalty." Some of the crew members believed that upon return to Poland, they would become victims of political persecution. After a mutiny in which no serious injuries occurred, these crew members diverted the trawler to Britain. Polish authorities demanded extradition, charging the crew members with common, non-political crimes analogous to mu-

intention. The term "incidence test" thus may be somewhat misleading. It derives from an earlier interpretation of the Extradition Act by Justice Stephen, the third *Castioni* judge:

[T]he expression in the Extradition Act ought (unless some better interpretation of it can be suggested) to be interpreted to mean that fugitive criminals are not to be surrendered for extradition crimes, if those crimes were incidental to and formed a part of political disturbances.

2 J. STEPHEN, HISTORY OF THE COMMON LAW OF ENGLAND 70-71 (1883).

14. [1894] 2 Q.B. 415.

15. Extradition Act of 1870, 33 & 34 Vict., ch. 52.

16. [1894] 2 Q.B. 415, 419. Justice Cave explained:

[T]here must be two or more parties in the State, each seeking to impose the Government of their own choice on the other in pursuance of that object, it is a political offense, otherwise not. In the present case there are not two parties in the State, each seeking to impose the Government of their own choice on the other; for the party with whom the accused is identified. . . the party of anarchy, is the enemy of all Governments. Their efforts are directed primarily against the general body of citizens.

Id.

17. Regina v. Governor of Brixton Prison, ex parte Kolczynski, [1955] 1 Q.B. 540.

tiny and kidnapping.¹⁸

Britain refused extradition. The accused seamen were allowed to introduce evidence suggesting that they would, in fact, be punished for treason if returned to Poland. On writ of habeas corpus, the Queen's Bench found this evidence sufficient to establish that Poland's motive was to punish the accused for offenses of a political character; thus the court found that the Extradition Act required nonextradition. The Justices of the Queen's Bench justified the denial of extradition because Poland intended to try the accused for treason rather than for the common crimes upon which it had based its request.¹⁹

Kolczynski illustrates the impossibility of applying the political offense exception without considering the motives of the government requesting extradition. It also foreshadows the difficulty of preserving both the system of extradition and the political offense exception as the concept of political action expands beyond rebellion of the types covered in *Castioni*. As *Meunier* illustrated, once the action moves beyond this classic example of political opposition to the government, the courts are left with little to guide them in their attempts to define political actions that justify a principled refusal to grant a request for extradition.

III. The Predominant Political Motivation Test in Swiss Law

Swiss courts have taken a comparatively sophisticated approach to the determination of whether an act constitutes a political offense. The "political motivation" test looks into the subjective motivation of the accused and mandates nonextradition for political motivation when two conditions are satisfied. First, the act for which extradition is sought must have been directly related to furthering a goal of a political move-

18. *Id.* at 543. The precise allegations were: use of force, depriving the captain and other crew members of their freedom, wounding the party secretary, damaging the ship radio, preventing the captain from commanding the ship, and exposing the ship and crew to the danger of calamity at sea.

19. Issues such as whether the accused will receive a fair trial in the country demanding extradition and whether the accused will be tried for offenses other than those for which he has been found to be extraditable have consistently been labelled "humanitarian considerations" which only the State Department has competence to consider. *See, e.g.,* *Neely v. Henkel*, 180 U.S. 109 (1901); *In re Lincoln*, 228 F. 70, 74 (E.D.N.Y. 1915), *aff'd per curiam* 241 U.S. 651 (1916); *In re Gonzales*, 217 F. Supp. 717, 722-23 (S.D.N.Y. 1963).

Dicta in recent cases, however, suggest that repudiation of the "rule of noninquiry" is possible in extraordinary cases. *See Gallina v. Fraser*, 278 F.2d 77, 79 (2d Cir. 1960) *cert. denied*, 364 U.S. 851 (1960) ("We can imagine situations where the relator, upon extradition, would be subject to procedures or punishment so antipathetic to a federal court's sense of decency as to require reexamination of the principle."); *Cf. also* *Rosado v. Civiletti*, 621 F.2d 1179 (2d Cir. 1980) (Prisoners convicted of crime in Mexico and serving out sentences in the United States pursuant to Mexican-American Treaty on Execution of Penal Sentences had right to challenge Mexican trial procedure but had waived the right.)

Political Offense Exception

ment. Second, the "predominance theory," requires that the political element of an act be greater than the common crime element so that unnecessary injury or cruelty is avoided.

This Swiss approach was established in *In re Ockert*.²⁰ That case involved the German government's extradition demand for a German national whom it accused of having murdered a member of the National-Socialist (Nazi) party. At the time of the incident in question, Ockert had been active in the Reichsbanner, the paramilitary arm of the Social-Democratic Party that opposed Nazi dogma. Ockert had, indeed, shot a Nazi during the course of a street clash between members of their respective parties.

The Federal Tribunal found that Ockert's political motivation placed the act under the political offense exception of the Swiss international extradition statute.²¹ The Federal Tribunal's opinion did not consider whether the shooting was significantly related to the objectives of the Social-Democratic Party. Thus, *Ockert* is silent as to the limits of the applicability of the political offense exception to acts motivated by subjective political beliefs.²² Such limits had, however, been set forth in an earlier decision.

In *In re Kaphengst*,²³ the Federal Tribunal acceded to the German government's demand for a German national who was charged with exploding a series of bombs at public sites and injuring several civilians. Though Kaphengst's motivation was political, he was not associated with a political movement. Noting this, the Federal Tribunal held that the political offense exception applies only to acts that are proximately related to an organized attempt to overthrow a government. Random acts of violence would never further such an objective, and therefore fall outside of the exception.²⁴

A similar limitation of *Ockert* may be drawn from the *Wassilief*²⁵ case. There the Federal Tribunal decided that acts that are unnecessary or out of proportion to a political objective cannot constitute political offenses. Even assuming that the political motivation of the accused is to further

20. 59 BG I 136; 7 Ann. Dig. 369 (Switzerland, Fed. Tribunal) (1933).

21. Swiss-German Extradition Treaty of 1874, Art. I(I); *Id.* at 369.

22. See Garcia-Mora, *The Nature of Political Offenses: A Knotty Problem of Extradition Law*, 48 VA. L. REV. 1226 (1962).

23. 56 BG I 457; 5 Ann. Dig. 292 (Switzerland, Fed. Tribunal) (1930).

24. *Id.* at 293-94. The court stated:

The practice of the Federal Court in regard to extradition showed that the Court always refused to attribute the character of a political offense to purely terroristic acts which were not mere episodes in the course of an action aiming at an immediate overthrow of the state.

25. Decided April 13, 1908, reported in [1909] FOR. REL. U.S. 519 (1914).

the cause of a political movement that seeks to control the state, the Tribunal found that a violent act is not automatically a political offense. In effect, this approach affords the Swiss judiciary wide discretion to inquire into the relevant circumstances of a case.

In re Kavic,²⁶ for example, rejected the Yugoslavian government's extradition demand for Yugoslavian nationals who had hijacked a plane to Switzerland despite the absence of past political activity on the part of the accused or of any widespread political insurrection in Yugoslavia. The Federal Tribunal found that, in light of the totalitarian nature of Yugoslavia, the political element of the hijacking predominated over the common crime element.²⁷

Cases like *Kaphengst* and *Kavic* illustrate that political offense jurisprudence cannot rest solely, or even principally, on an appraisal of subjective motivation. *Kaphengst's* approach to terrorism is strikingly similar to that taken by the British court in *Meunier*;²⁸ neither court will invoke the political offense exception in cases where the link between the political motivation and the target of violence is tenuous, or where the political motivation itself is ill-defined or unrelated to a struggle for political power.

To the extent that the predominance approach requires careful scrutiny of the circumstances surrounding political violence, it permits reconciliation of all the interests raised by the political offense exception. Yet, unless courts develop criteria for determining whether a political conflict exists, the Swiss approach could become *ad hoc* and discretionary, thereby making it more a political tool of foreign policy than a judicial standard for balancing the interests involved in the political offense exception.

IV. The Incidence Test in American Law

The American approach corresponds in key respects to the British approach. American courts have adopted the incidence test in determining whether an alleged crime actually constitutes a political offense. How-

26. 78 ATF I 39; 19 Ann. Dig. 371 (Switzerland, Fed. Tribunal) (1952).

27. 19 Ann. Dig. *supra* note 26, at 374. The court stated:

[T]he relation between the purpose and the means adopted for its achievement must be such that the ideals connected with the purpose are sufficiently strong to excuse, if not justify, the injury to private property, and to make the offender appear worthy of asylum. . . . Freedom from the constraint of a totalitarian State must be regarded as an ideal in this sense. In the present case the required relationship undoubtedly exists; for, on the one hand, the offences against the other members of the crew were not very serious, and, on the other, the political freedom and even existence of the accused was at stake, and could only be achieved through the commission of these offences.

28. See *supra* notes 14-16 and accompanying text.

Political Offense Exception

ever, unlike the British courts, American courts have refused to consider the motives of a state requesting extradition.

The incidence test was first applied by an American court in the case of *In re Ezeta*.²⁹ That case involved the Republic of Salvador's extradition request for its former President, Antonio Ezeta, and four former military officers. Salvador accused these men of having committed murder, robbery, and arson. Each of the charges arose from actions that Ezeta and his officers had taken in a desperate attempt to subdue the violent revolutionary movement that eventually overthrew Ezeta's government. In particular, the murder charges stemmed from the execution of four persons who had refused to defend the regime against revolutionary forces. The robbery charge involved funds Ezeta had stolen to pay his troops.

Article III of the extradition treaty between Salvador and the United States imposed no obligation to return political offenders.³⁰ The court, while refusing to speculate as to Salvador's motives, denied the extradition demand. Judge Morrow reasoned from the holding of the *Castioni* decision that Ezeta's actions had been in furtherance of a struggle to maintain his government and were therefore political.³¹

Two years after *Ezeta* the Supreme Court decided its only political offense case. In *Ornella v. Ruiz*,³² the Mexican government demanded the extradition of three Mexican nationals who had crossed the Mexican border from Texas with a band of armed men. The band had attacked a small contingent of Mexican soldiers that had sought to impede its progress, and proceeded to raze and loot the village of St. Ignacio.

Mexico charged the three men with murder, kidnapping, arson, and robbery. A federal magistrate found the accused to be extraditable.³³ On

29. 62 F. 972 (N.D. Cal. 1894).

30. The article read in relevant part: "The provisions of this treaty shall not apply to any crime or offense of a purely political character." "Political character" was undefined. Mexico-United States Extradition Treaty of 1862.

31. *Ezeta* was decided under the prior extradition statute. The statute did not expressly authorize the judiciary to apply the political offense exception provisions that were contained in treaties, but did provide for judicial determination of whether probable cause existed to extradite an accused person. *Ezeta* held that this probable cause hearing provision of the statute required the courts to interpret treaties and thereby empowered them to apply the political offense exception. 62 F. 972 (N.D. Cal. 1894).

32. 161 U.S. 502 (1896).

33. *Id.* at 503-04. The magistrate apparently was influenced in his decision by a letter from Secretary of State Greshaw to the Mexican Foreign Minister which read in relevant part:

The idea that these acts were perpetrated with *bona fide* political or revolutionary designs is negated by the fact that immediately after this occurrence, though no superior armed force of the Mexican government was in the vicinity to hinder their advance into the country, the bandits withdrew with their booty across the river into Texas.

Id. at 511.

writ of habeas corpus, a district court reversed and held that the accused had committed political offenses.³⁴ The Supreme Court reinstated the magistrate's judgment on the ground that the district court had gone beyond the scope of habeas review and that the magistrate's decision was not clearly erroneous.³⁵ Although the Court did not expressly rule on the applicability of the political offense exception to the facts of the case, it did note in *dicta* that the band's immediate withdrawal into Texas, despite the absence of a superior Mexican force in the area, supported the magistrate's finding. In short, the band's rampage did not rise to the level of a political uprising.

Until *Kardzole v. Artukovic*³⁶ the American judiciary had not been presented with an opportunity to establish a clear line of demarcation between political violence that furthers a political uprising and violence that is merely contemporaneous with such an uprising. Unfortunately, the *Artukovic* court only further obscured this distinction.

Artukovic had been Minister of the Interior of the pro-Nazi government of Croatia during World War II. Croatia was the state entity created in 1941 from what had been Yugoslavia. It came into being just prior to the German invasion when the leaders of the Yugoslavian government fled the country. The new Croatia rulers exploited their position to persecute their historical rivals, the Serbs. Throughout World War II, various factions sought control of the government.

After the war, Artukovic fled to the United States and the reconstructed Yugoslavian government sought his extradition on charges of having ordered the execution of two hundred thousand prisoners in Croatia concentration camps. The district court for the Northern District of California denied Yugoslavia's request and found that Artukovic had committed political offenses as part of a political uprising.³⁷ The Ninth Circuit affirmed.³⁸ Writing for the court, Judge Stephens found it significant that Artukovic had not personally killed anyone but had instead ordered the executions in his official capacity. This, the judge reasoned, was a political offense in the context of a struggle to establish and

34. *Id.* at 504.

35. *Id.* at 508. The court instructed that the scope of habeas corpus review of an extradition magistrate's decision was limited to: (1) whether the magistrate had jurisdiction; (2) whether the offense charged was listed as an extraditable offense in the relevant treaty; and (3) whether there was at least legal evidence supporting the magistrate's decision. *Id.*

36. 140 F. Supp. 245 (S.D. Cal. 1956), *aff'd sub nom.* Karadzole v. Artukovic, 247 F.2d 198 (9th Cir. 1957), *vacated per curiam*, 355 U.S. 393 (1958), *remanded sub nom.* United States ex rel Karadzole v. Artukovic, 170 F. Supp. 383 (S.D. Cal. 1959).

37. *Artukovic v. Boyle*, 140 F. Supp. 245 (S.D. Cal. 1956).

38. *Karadzole v. Artukovic*, 247 F.2d 198 (9th Cir. 1957).

Political Offense Exception

maintain a government in wartime.³⁹ The court dismissed Yugoslavia's argument that the executions nevertheless constituted war crimes, remarking only that the applicability of international proscriptions against war crimes to the political offense exception had not been established.⁴⁰

Artukovic weakens the incidence test, and cannot be reconciled with the historical purpose of the political offense exception. The decision ignored the civilian status of the victims and failed to inquire whether mass killings were actually necessary to maintain the Croatian governments.⁴¹ Failure to distinguish between violence that is in furtherance of, rather than merely contemporaneous with, a political uprising transforms the incidence test into a license for gratuitous killing.⁴² The trend of cases such as *Ezeta* and *Artukovic* seems to indicate that United States courts will lower the threshold for the application of the political offense exception for those individuals associated with a regime or government that has fallen from power. By skewing the standards for particular groups in this way, such an approach may jeopardize the neutrality that the political offense exception doctrine seeks to maintain. Cases following *Artukovic* demonstrate a somewhat surprising application of the political offense exception. *Ramos v. Diaz*⁴³ involved the Cuban government's extradition request for two of its nationals, Diaz and Cruzata, who had formerly served as military prison guards. The extradition request alleged that Diaz and Cruzata had shot and killed a prisoner as he attempted to escape from a garage that served as a makeshift prison. The incident occurred in 1954, just after the fall of the Batista regime. The new Castro government had wanted to interrogate the prisoners and had issued a standing order mandating death to guards who failed to secure their charges.

The court held that the political offense exception applied and denied the Cuban extradition request. Judge Lieb observed that the killing of the political prisoner constituted as much of a political uprising as did the killing involved in *Castioni*.⁴⁴ *Ramos* is the only American case to have applied the political offense exception to offenders who were on the same side of a political uprising as were those requesting extradition. Legal realist theory might explain the decision as the result of antipathy for the

39. *Id.* at 204.

40. *Id.* at 204-06. The court believed that the existing instruments purporting to establish a duty to surrender war criminals had not gained sufficient force of law to modify "longstanding interpretation of similar treaty provisions." *Id.* at 205.

41. *Id.* at 204.

42. See Lubet & Czackes, *supra* note 6 at 205.

43. 179 F. Supp. 459 (S.D. Fla. 1959).

44. *Id.* at 462-63.

Castro regime. This explanation does not resolve the confusion *Ramos* created over the criteria for determining the existence of a political uprising.

The only cases holding the political offense exception inapplicable because of the factual nonexistence of an uprising arose in situations where these facts were not at issue. *In re Gonzalez*⁴⁵ held that no uprising was in progress in the Dominican Republic when military prison guards killed two prisoners. Similarly, *Escobedo v. United States*⁴⁶ held two United States nationals extraditable to Mexico for the attempted kidnapping and murder of a Cuban consular official despite their claim that they had planned to ransom the official for political prisoners in Cuba.⁴⁷

The foregoing review of the case law illustrates that the traditional American approach to the political offense exception has been somewhat problematic. Comparison of *Ramos* and *Gonzalez*, where the courts reached contradictory conclusions on very similar fact patterns, illustrates the lack of a consistent and principled jurisprudence. The results suggest an approach more concerned with political needs and realities than with a principled application of the incidence test. The search for a more consistent jurisprudence has led to the incorporation of elements of the Swiss predominant political motivation test.

This shift toward the Swiss approach is seen in *Abu Eain*,⁴⁸ perhaps the most doctrinally significant decision since *Castioni*. The *McMullen*⁴⁹ and *Mackin*⁵⁰ cases address the complex issue of determining the existence of a political uprising.

In *Abu Eain* the accused was a Jordanian national and a member of the Fatah faction of the Palestine Liberation Organization (PLO). The government of Israel sought his extradition for his alleged participation in the bombing of a marketplace in Tiberias during a Jewish religious festival and youth rally. Two Israeli boys died and thirty-six other persons were injured in the explosion. A United States federal magistrate in Illinois rejected Eain's claim that the act was a political offense and

45. 217 F. Supp. 717 (S.D.N.Y. 1963).

46. 623 F.2d 1098 (5th Cir. 1980).

47. *Id.* at 1104. Judge Anderson instructed: "This circuit defines a political offense under extradition as an offense committed in the course of and incidental to a violent political disturbance, such as war, revolution and rebellion. . . . An offense is not of a political character simply because it was politically motivated." (citations omitted). *Id.*

48. In re Extradition of Ziyad Abu Eain, No. 79 M 175 (N.D. Ill. Dec. 18, 1979) (mem.), *habeas corpus denied sub nom.*, *Abu Eain v. Adams*, 529 F. Supp. 685 (N.D. Ill. 1980), *aff'd sub nom.* *Eain v. Wilkes*, 641 F.2d 504 (7th Cir. 1981), *cert. denied*, 454 U.S. 894 (1981).

49. In re Extradition of McMullen, No. 3-78-1099 MG (N.D. Cal. May 11, 1979).

50. *United States v. Mackin*, 668 F.2d 122 (2d Cir. 1981).

Political Offense Exception

found him extraditable.⁵¹ The magistrate found unpersuasive Eain's argument that the bombing of a civilian target was a relative political offense in light of the PLO's long struggle to create a "democratic non-sectarian state" in place of Israel.⁵²

The magistrate found three areas of relevant inquiry: (1) the offender's past participation in a political movement; (2) the existence of a connection between the crime and a political objective; and (3) the proportionality of the crime to the political objective.⁵³ Accordingly, the magistrate held that, although Eain had been active in an organization with clearly defined political goals, there was no connection or proportionality between the PLO's political agenda and the use of violence against civilian targets.⁵⁴

Following an unsuccessful habeas corpus petition to the district court,⁵⁵ Eain appealed to the Seventh Circuit Court of Appeals. In affirming the district court's disposition, Judge Woods handed down a landmark decision,⁵⁶ significant both for its defense of judicial competence to decide political offense questions and for its substantive contribution to the analysis of these questions.

The government argued that the courts could not apply the political offense exception because such inquiries present political questions and also because the terms of the United States-Israel extradition treaty⁵⁷ require the Executive Branch to apply the exception. In addition, the government suggested that it was irrational for the courts to decide whether particular acts constitute political offenses while not inquiring into the motives of a state requesting extradition. Judge Wood rejected both arguments.⁵⁸ Determination of the applicability of the political offense exception does not, as the government argued, require "an initial policy determination of a kind clearly for nonjudicial discretion."⁵⁹ On the contrary, Judge Wood reasoned, a judge may determine the applicability of the exception through objective findings of past fact, such as whether a violent controversy existed at the time an act was perpetrated. Though

51. *In re Extradition of Eain*, No. 79 M 175 (N.D. Ill. Dec. 18, 1979) (mem.)

52. *Id.* at 12-13.

53. *Id.* at 19-21.

54. *Id.*

55. *Abu Eain v. Adams*, 529 F. Supp. 685 (N.D. Ill. 1980).

56. *Eain v. Wilkes*, 641 F.2d 504 (7th Cir. 1981).

57. 14 U.S.T. 1707, Art. VI(4) (1963).

58. *Eain v. Wilkes*, 641 F.2d at 513-14.

59. *Id.* Judge Wood remarked:

The existence of a violent political disturbance is an issue of past fact: either there was demonstrable, violent activity tied to political causes or there was not.

Id.

the State Department may possess a superior ability to gather information regarding the intensity of foreign political disturbances, it can readily share such information with the courts through *in camera* review procedures. Hence, there need be no embarrassment to the executive in the exercise of foreign policy because the executive may consult with the court and because the court's inquiry is limited to factual matters.

Judge Wood also disagreed with the government's interpretation of the United States-Israel extradition treaty as placing the political offense issue within the exclusive purview of the executive. The judge found that judicial construction of extradition treaties had long been a major procedural safeguard for accused persons and that there was little indication that the drafters of the treaty had intended to withdraw that protection.⁶⁰ Finally, Judge Wood distinguished the question of whether an act constitutes a political offense from the characterization of a state's motivation in demanding extradition. The latter function calls for policy determinations that are clearly inappropriate for courts, and it is therefore not surprising that courts follow the rule of noninquiry.⁶¹

Having established its competence to consider the issue, the court proceeded to discuss the appropriate test for applying the political offense exception. Initially, Judge Wood questioned the magistrate's implicit assumption that the Israeli-Palestinian dispute constituted a political uprising.⁶² It was far from obvious, in the court's view, that the traditional conception of a political uprising could be extended to the Israeli-Palestinian dispute, inasmuch as the PLO's tactics were more terrorist than conventional.⁶³ It was, however, unnecessary to decide the issue because the magistrate had properly ruled that there was no connection or proportionality between the killing and maiming of civilians and the PLO's political goals. In reviewing this conclusion, Judge Wood used the lan-

60. Judge Wood said:

[O]ne constant in American extradition law is that the magistrate is to make the initial determination in the extradition process. We hesitate to hold on so slim a record as is available on the intent of the drafters of the Treaty in this case that the major procedural safeguards established to protect the defendant's rights have been deliberately written out of the document.

Id. at 518, quoting *Berenguer v. Vance*, 473 F. Supp. 1195, 1198 (D.D.C. 1979).

61. *Id.* at 516.

62. *Id.* at 519.

63. *Id.* Judge Wood remarked:

The nature of that [Israel-P.L.O.] conflict is somewhat different than disturbances that have been considered in other cases where resistance to extradition on grounds of a political offense exception have been sustained. Those cases involved on-going, organized battles between contending armies.

Id., citing *Ramos v. Diaz*, 179 F. Supp. 459 (S.D. Fla. 1959); *United States v. Artukovic*, *supra* note 36.

Political Offense Exception

guage of the traditional incidence test,⁶⁴ but did not end the analysis there. He went on to note that indiscriminate attacks on civilian targets are really directed at the social, not the political, structure.⁶⁵ Such random violence can never, the court concluded, advance a political cause.⁶⁶

Abu Eain is a decision of great doctrinal importance. It refines the incidence test and incorporates the proportionality approach of the Swiss courts. Subsequent cases follow *Abu Eain* in refusing to apply the political offense exception to violence against civilians. However, the case did not settle the question of what scale of violence or degree of discontent might constitute a political uprising.

The *McMullen*⁶⁷ case, a decision contemporaneous with *Abu Eain*, concerned the United Kingdom's extradition request for Peter McMullen. The request alleged that McMullen had participated in the 1972 bombing of a British army barracks in North Yorkshire, England. McMullen had had a history of involvement with the Provisional Irish Republican Army (PIRA), beginning in 1972, after his desertion from the British army. In 1974, McMullen had been convicted by an Irish court of membership in the PIRA and of carrying firearms. He was sentenced to three years in prison. Following his release, the PIRA sought to recruit McMullen for further service, and threatened reprisals when he declined. McMullen escaped to the United States in 1978 and was arrested for carrying a false passport. Scotland Yard detectives were allowed to question him, and he provided information about his participation in past PIRA activities. Thereafter, the United Kingdom demanded his extradition.

A federal magistrate in the Northern District of California applied the political offense exception and found McMullen nonextraditable.⁶⁸ Two aspects of the decision are important. First, the magistrate found that a political uprising had existed in Northern Ireland during 1972.⁶⁹ This conclusion was based on the PIRA's longstanding goals of independence from Ulster, the presence of British troops in Northern Ireland, the termination of home rule, and the history of political violence in the region.

64. *Abu Eain*, 641 F.2d at 520.

65. The definition of "political disturbance", with its focus on organized forms of aggression such as war, rebellion and revolution, is aimed at acts that disrupt the political structure of a State, and not the social structure.

Id.

66. *Id.* at 521.

67. *In re Extradition of McMullen*, No. 3-78-1099 M (N.D. Cal. May 11, 1979).

68. *Id.* at 4.

69. *Id.* at 6. U.S. Magistrate Frederick J. Woelfer said:

[McMullen] acted as a member of PIRA, his activities were directed by persons in authority in the PIRA, and the bombing was a crime incidental to and formed as a part of a political disturbance, uprising or insurrection and in furtherance thereof.

Id.

Second, the magistrate applied the second half of the *Castioni* test to find that the bombing had been incidental to the PIRA's political objectives. *McMullen*⁷⁰ was the first decision to advance criteria for determining whether a political uprising exists. It conducts a contextual analysis in an attempt to determine what political claims have been asserted within the demanding state and what political struggles or disturbances have resulted from the attempted assertion of these claims.

Development of this approach was continued in another case that involved the British and the PIRA, *In re Mackin*.⁷¹ Desmond Mackin was a member of the PIRA whom the United Kingdom accused of wounding a British soldier in a 1978 gunfight between PIRA members and British troops in Belfast.⁷² A federal magistrate in the Southern District of New York denied the United Kingdom's extradition demand on the ground that Mackin's action constituted a political offense.⁷³ The magistrate found that the PIRA had been conducting an uprising in Belfast at the time of the shooting and that Mackin's action was incidental to that uprising.

The United States brought an appeal and, in the alternative, a request for mandamus in the Second Circuit Court of Appeals. Judge Friendly held that the U.S. international extradition statute⁷⁴ did not permit the government to appeal from a finding of nonextraditability,⁷⁵ and that mandamus was inappropriate because the magistrate's disposition was clearly within her jurisdiction. The opinion does not explicitly address how political offenses should be analyzed, but does consider the government's argument that the extradition treaty between the United States and Britain vested sole competence to consider the political offense exception in the executive.⁷⁶ Judge Friendly first approached the issue in a

70. The Immigration and Naturalization Service subsequently attempted to deport McMullen to Northern Ireland. McMullen claimed that his deportation would violate § 243(h) of the Immigration and Naturalization Act, 8 U.S.C. § 1254, which forbids the deportation of persons likely to suffer political persecution. McMullen's claim was based on the assertion that the authorities in Ireland could not prevent the PIRA from harming him. The district court for the Northern District of California agreed and disallowed his deportation. *McMullen v. Immigration and Naturalization Service*, No. 278-1099 MG (N.D. Cal. 1980), *aff'd* 658 F.2d 1312 (9th Cir. 1981).

71. *Supra* note 50.

72. The extradition request by Britain and Northern Ireland charged Mackin with attempted murder, wounding a soldier with intent to do grievous bodily harm, and illegal possession of firearms.

73. *Supra* note 50 at 124-25.

74. 28 U.S.C. § 1291.

75. *Supra* note 50 at 125-30.

76. 28 U.S.T. 227, T.I.A.S. 8468. Art. V(1)(c)(i) of the treaty provides:

Extradition shall not be granted if: . . . the offense for which extradition is requested is regarded by the *requested Party* as one of a political character. (emphasis added)

Political Offense Exception

manner similar to that of Judge Wood in the *Abu Eain* case, noting that there had been no showing that the drafters of the treaty had intended to deviate from the longstanding provision for judicial scrutiny of political offense claims.⁷⁷ Judge Friendly then examined the history of U.S. international extradition statutes and found that Congress had always contemplated an initial determination of the political offense issue by the judiciary.⁷⁸

The foregoing review indicates that the recent political offense exception cases are significant for two reasons. First, the courts that have confronted the issue have declined to alter the existing allocation of competence between the judiciary and the executive.⁷⁹ Neither the *Abu Eain* nor the *Mackin* courts found the political question doctrine to be a constitutional impediment to judicial consideration. In addition, neither court would interpret the extradition treaty before it in a manner that would limit its jurisdiction. Thus, it appears that the policies underlying the provision of procedural safeguards can only be disavowed through an express act of Congress.

Second, the cases reformulate the traditional incidence test. *Abu Eain* set forth a contextual examination of the act at issue to determine whether it could have furthered a political goal. This establishes a trend

The government interpreted the term "requested Party" to refer only to the executive.

77. Judge Friendly noted that, in enacting America's first extradition statute, the Extradition Act of 1848, Congress explicitly provided for a judicial hearing to determine whether an extradition charge could be supported by the evidence. The Judge further noted that Congress had been shocked by the extradition without judicial process of Jonathan Robbins to Britain for what appeared to be political offenses and intended to erect safeguards against similar occurrences. *Id.* at 134-35.

78. The current United States statute concerning international extradition, 18 U.S.C. § 3184, allows the representatives of a foreign nation with which an extradition treaty is in force to request the return of a fugitive by presenting a copy of the foreign complaint, together with affidavits and other supporting materials, to a federal or state magistrate in the district where the accused is believed to be present. The modern trend is for the foreign government to submit the request for extradition and supporting materials to the State Department, which, after evaluation, forwards the papers to the United States Attorney in the district where the person sought to be extradited may be found. The United States Attorney then files the complaint, seeks an arrest warrant from the magistrate, and argues on behalf of the requesting state. While the scope of the hearing before the magistrate is limited to determining whether the claimed offense is within the applicable treaty, the magistrate must also consider the applicability of the political offense exception as specified in the treaty. Should the magistrate find that he cannot certify the matter to the Secretary of State for extradition, the judgment is final, and neither the requesting foreign government nor the Secretary of State may take a direct appeal from the magistrate's decision. However, should the magistrate find the person extraditable, the Secretary retains the right to overturn that finding if the Secretary determines that the requesting state seeks to punish the accused for a political offense rather than for common crimes. See Bassiouni, *International Extradition in American Practice and World Public Order*, 36 TENN. L. REV. 1, 27 (1968); Note, *Executive Discretion in Extradition*, 62 COLUM. L. REV. 1313, 1316 (1962).

79. See *supra* notes 55-59 and accompanying text.

away from the application of the political offense exception, as seen in cases like *Artukovic*, and suggests that courts should consider the target and means to determine whether the violent acts were reasonably related and proportional to a group's political ends. Furthermore, the *McMullen* case departed from prior case law in its attempt to assess the PIRA's political goals in light of claims being made by other groups in the larger society.

Despite these significant refinements made in the recent cases, the incidence test remains an incomplete analytical framework for application of the political offense exception in the context of modern political violence. The analysis must move beyond *McMullen* and *Mackin* to define a political uprising so that courts can apply the standards of proportionality and reasonableness in determining whether the actions under consideration are reasonably related to achieving the goals of such a political uprising. Such a clarification is necessary, because, as *McMullen* and *Mackin* demonstrate, cases will inevitably arise where decisions cannot be based solely on the status of the targets of violence. The problems inherent in this approach are illustrated by French efforts to develop an "objective test" based on the nature of the targets of violence.

V. The Objective Test in French Law

Precise statement of the French approach is difficult because the jurisprudence has been inconsistent and often has appeared to attach determinative significance to foreign policy imperatives, to the exclusion of the other interests implicated in the political offense exception. Nevertheless, the approach is commonly described as following an "objective test" that directs inquiry to the character of the target of an act for which extradition is sought. Only acts that impact solely on a government are supposed to be political offenses.

The leading case defining the objective test is *In re Giovanni Gatti*.⁸⁰ Gatti was a national of the Republic of San Marino who had been sentenced in that country to a twelve-year prison term for the attempted murder of a communist. Gatti sought to defend against extradition to San Marino through a demonstration that his acts had been politically motivated. Though the French international extradition statute appeared broad enough to forbid extradition for political offenses,⁸¹ the Cour

80. 14 Ann. Dig. 145 (Cour d'appel, Grenoble 1947).

81. The French Extradition Law of March 10, 1927 provides in relevant part:

Political Offense Exception

d'appel did not inquire into the circumstances surrounding the incident⁸² or into Gatti's subjective motivation. The Cour d'appel instead limited its inquiry to whether the act had impacted exclusively on the rights of the state.⁸³

Gatti is anathema to the legislative intent behind the French international extradition statute because the statute was intended to mandate scrutiny of the circumstances surrounding an act and of the perpetrator's subjective motivation.⁸⁴ Indeed the language of the act itself directs inquiry not only into the relevant circumstances and the perpetrator's subjective motivation, but also into the motivation of the requesting government. Yet, the decision appears to recognize a political offense exception only for nonviolent, purely political offenses, since relative political offenses inevitably injure people or property rather than only abstract rights of the state.⁸⁵

In the period immediately following *Gatti*, the French courts significantly broadened the scope of the objective test. This trend began with *In re Rodriguez*,⁸⁶ in which the Cour d'appel of Paris refused the Spanish government's demand for the extradition of two of its nationals who had been members of a movement that sought to overthrow the Spanish government and whom it charged with arson and murder. Similarly, in *In re*

[Extradition is not granted] when the crime or offense has a political character or when it is clear (resulte) from the circumstances that the extradition is requested for a political end.

As to acts committed in the course of an insurrection or a civil war by one or the other of the parties engaged in the conflict and in the furtherance. . . of its purpose, they may not be grounds for extradition unless they constitute acts of odious barbarism and vandalism prohibited by the laws of war, and only when the civil war has ended.

Id. at title I, art. 5, para. 2, in *Harvard Research* 380-81, 29 AM. J. INT'L L. 380 (1935) (unofficial translation).

82. Had the Cour d'appel engaged in such an inquiry, it would have found that no immediate and large-scale political conflict existed at the time of the incident.

83. The Cour d'appel announced:

Political offenses are those which injure the political organism, which are directed against the constitution of the government and against sovereignty, which trouble the order established by the fundamental laws of the state and disturb the distribution of powers. . . . What distinguishes the political crime from the common crime is the fact that the former only affects the political organization of the state, the proper rights of the state, while the latter exclusively affects rights other than those of the state. The fact that the reasons of sentiment which prompted the offender to commit the offense belong to the realm of politics does not itself create a political offense. The offense does not derive its political character from the motive of the offender but from the nature of the rights it injures.

14 Ann. Dig. 145, 145-46 (Cour d'appel, Grenoble 1947).

84. Carbonneau, *Terrorist Acts—Crimes or Political Infraction? An Appraisal of Recent French Extradition Cases*, 3 HASTINGS INT'L & COMP. L. REV. 265, 275-76 (1980).

85. See, Garcia-Mora, *supra* note 22 at 1250.

86. 2 GAZ. PALAIS 113 (Cour d'appel, Paris, 1953).

*Hennin*⁸⁷ the Cour d'appel of Paris rejected the Swiss government's demand for a Swiss national charged with arson against private property on the ground that the accused had committed the offense in a heated political climate.

Though the trend away from the formalism of the objective test facilitated consideration of the context of political violence, it failed to produce an analytical framework. The courts simply announced their conclusions without attempting to identify the dispositive characteristics of a relative political offense. It is thus not surprising that the phenomenon of modern terrorism has prompted movement towards an objective test that is once again formalistic.

The first notable French case that concerned modern terrorism was *In re Abu Daoud*.⁸⁸ The case involved West German and Israeli extradition requests for Abu Daoud, the reputed organizer of the 1972 massacre of members of the Israeli Olympic team in Munich. After Daoud's provisional arrest in France, he was released to Algiers and the extradition was denied on the ground of technical insufficiencies in the two extradition requests. West Germany's request was found insufficient because the West German arrest warrant had not been processed through proper diplomatic channels. Israel's request was insufficient because Daoud had not been charged with a crime within the scope of the France-Israel extradition treaty.

It has been suggested that the Cour d'appel's disposition of the case was preordained by the court's fear that holding Daoud might jeopardize a pending oil deal between France and Saudi Arabia and a defense supply contract being negotiated between France and Egypt.⁸⁹

The *Klaus Croissant*⁹⁰ case marks the beginning of the French judiciary's attempt to establish a more principled, albeit still inflexible, jurisprudence. The case concerned West Germany's demand for a West German national who was the former attorney for operations in the Baader-Meinhof group. Croissant was charged with passing information between at large and imprisoned members of the Baader-Meinhof group while propagandizing on the group's behalf and participating in direct terrorist attacks.⁹¹ The court found that there was insufficient evidence to link Croissant with any terrorist attack and declared that propagandizing was not a basis for extradition under the France-West Ger-

87. JURIS-CLASSEUR PERIODIQUE (J.C.P. II) No. 15274 (Cour d'appel, Paris, 1967).

88. 104 J. DR. INT'L 843 (Cour d'appel, Paris 1977).

89. See Carbonneau, *supra* note 84, at 284-86.

90. The decision of the Cour d'appel of Paris was not officially reported. For a journalistic account, see *Le Figaro*, Nov. 17, 1977, at 17, col. 3.

91. See Carbonneau, *supra* note 84, at 287.

Political Offense Exception

many extradition treaty. The court did, however, grant extradition on the basis of the first charge which it found to constitute a common crime.

Though *Klaus Croissant* circumvented the most difficult issues on technical grounds, it does represent a significant development in French jurisprudence. The refusal to hold that Croissant's claimed political motivation transformed an otherwise common crime into a relative political offense may be seen to represent a return to the *Giovanni Gatti* formulation of the objective test.

This trend was continued in the *Piperno*⁹² case. In *Piperno* the Italian government demanded the extradition of Francesco Piperno for his alleged participation in the kidnapping and murder of Aldo Moro. The requisition charged that Piperno had been involved in the incident while a member of the Red Brigade. The French court held that irrespective of political motivation, no political character can be ascribed to an act such as murder because of its seriousness.⁹³

Thus the French judiciary has come full circle and seriously undermined the relative political offense exception in its efforts to deal with modern political violence. It remains unclear whether the French courts will refuse to apply the exception under any circumstances or whether the exception will cease to exist as a legitimate doctrine of law. The French response underscores the importance of developing criteria for distinguishing between terrorism and rebellion. Without such a distinction, maintenance of both the extradition system and the political offense exception will prove impossible.

VI. Issues in the Jurisprudence of the Political Offense Exception

General dissatisfaction with the case law has led to numerous scholarly and legislative proposals for change. Each of these proposals ad-

92. For an account of the case, see *Id.* at 291-96.

93. Carbonneau takes the position that *Klaus Croissant* and *Piperno* together represent movement towards that portion of the Swiss approach to the political offense exception that inquires into the proportionality between the asserted political goal and the means used to reach that goal. Using this analysis, Carbonneau's findings lead to the conclusion that terrorist violence can never be the basis of application of the exception since this violence rarely advances a legitimate political cause. Unfortunately, the commentator does not make clear how terrorism and rebellion are to be distinguished, except to suggest that certain very "serious" acts should never be considered political offenses. Carbonneau, *supra* note 84, at 290-97. This is essentially the approach taken in the European Convention on the Suppression of Terrorism, Jan 27, 1977, 15 INT'L LEGAL MATERIALS 233 (1977).

The problem with this approach is that many political uprisings do involve the use of firearms and killing. Carbonneau's approach, then, could lead to extinction of the political offense exception for all but pure political offenses or those relative political offenses that involve only property crimes.

addresses a facet of the problem, but none deals directly with the core issue of distinguishing a political offense from terrorism.

The most sweeping proposal is also the most facile: elimination of the political offense exception from extradition treaties.⁹⁴ The Secretary of State would, instead, use his discretion in granting requests for political asylum.⁹⁵ This political method faces no legal impediments, but it does raise questions as to its utility in the conduct of foreign policy, as well as questions of fairness to the person seeking asylum. This proposal would make it impossible for the United States to be or to appear neutral in any foreign controversy once a participant reached the United States and requested asylum. The decision would turn solely on the Secretary's assessment of the short-term political implications of his response. The Secretary would be forced to appear to have taken a position on a foreign political controversy.

Proposals to retain the political offense exception but to vest exclusive competence to apply it in the Secretary of State raise similar objections.⁹⁶ This approach rests on the assumption that the political offense exception is anachronistic and that the rights of the individual should be ignored in the interest of foreign policy goals of the United States.

Proposals to retain the political offense exception and to continue to vest competence in the judiciary to apply the political offense exception preserve the neutrality goal. These proposals differ in the degree of latitude permitted the judiciary and the means chosen to constrain that latitude. The greatest constraint would take the form of Congressionally mandated exclusions.⁹⁷ Such an approach has been suggested by Congress in recent legislative proposals.⁹⁸ Under this approach, Congress

94. See, e.g., Epps, *The Validity of the Political Offense Exception in Extradition Treaties in Anglo-American Jurisprudence*, 20 HARV. INT'L L. J. 61, 82-83 (1979) (political offense case law explicable only in political terms; accused individual's rights adequately protected through the executive's authority to grant political asylum).

95. American extradition treaties do not designate the branch of government which is to apply the political offense exception.

96. See, e.g., Note, *Terrorist Extradition and the Political Offense Exception: An Administrative Solution*, 21 VA. J. INT'L L. 163, 178-83 (1981) (political offense exception protects rights of accused but should be implemented through State Department hearings).

97. S. 1639, 97th Cong., 1st Sess. (1981). The bill was introduced by Senator Thurmond. It provides that the courts may only consider whether the offense charged is on the list of extraditable offenses under the applicable treaty and whether probable cause exists to believe that the accused is guilty. *Id.* at § 3194. On these issues, a court's decision would be an appealable final judgment. Upon exhaustion of appeal from a finding of extraditability, the Secretary of State would determine the applicability of the political offense exception and thereby fulfill the treaty obligations of the United States. *Id.* at § 3196.

The Senate Foreign Relations Committee failed to approve S.1639, citing the historical purpose of the political offense exception and the important role of judicial processes in ensuring fair and impartial consideration.

98. S.1940, 97th Cong., 2d Sess. (1982).

Political Offense Exception

would specify particular types of conduct that could never be adjudged by a court to be a political offense.⁹⁹ The European Convention on the Suppression of Terrorism takes this approach.¹⁰⁰

A middle level of constraint would have Congress set guidelines that would substantially narrow the relative political offense exception.¹⁰¹ The guidelines would divide actions into *per se* exclusions from the political offense exception and actions that would qualify as political offenses only if committed under "extraordinary circumstances."¹⁰²

Both of these approaches would make hijacking, for example, a *per se* exclusion. The distinction between the two would depend on how broadly or narrowly either Congress or the courts defined "extraordinary circumstances" and whether any meaningful distinction could be made under this rubric given the violent nature of so many political offenses. The most important criticism of these approaches is that they attempt to create automatic categories for actions taken in very different contexts with different motives and different consequences.

The least restrictive alternative involves placing the burden of production and the burden of persuasion on the person seeking to invoke the political offense exception in an extradition hearing.¹⁰³ This proposal has the merit of clarifying what is now a confusing situation with no consistent precedents in the case law. The proposal also seems to recognize that the person involved will have the best access to information linking him to a political struggle. However, the problem of distinguishing between a political offense and terrorism remains.

A final proposal would remove the issue from national competence and have all extradition requests decided by an international juristic tribunal such as the International Court of Justice. Proponents argue that an international tribunal could operate more objectively than a municipal

99. *Id.* at § 1396.

100. European Convention on the Suppression of Terrorism, *supra* note 93.

101. S.1940, *supra* note 98 incorporates this approach.

102. The bill would have required the individual seeking to invoke the political offense exception to demonstrate the existence of extraordinary circumstances by clear and convincing evidence. More is involved than a shift in the burden of proof. For while use of the term "extraordinary circumstances" appears to invite particularized justice, the Report of the Senate Foreign Relations Committee indicates that the term is much narrower than the traditional incidence test. "Extraordinary circumstances" refers only to situations where the accused had first attempted to exercise non-violent civil or political rights and was then forced to resort to violence as a means of self-defense. Though expansive judicial interpretation of the definition of an attempt to exercise civil or political rights and of forced resort to violence would be possible, the more likely result would be *per se* inapplicability of the political offense exception to any form of guerilla warfare.

103. Bassiouni, *Ideologically Motivated Offenses and the Political Offense Exception in Extradition — A Proposed Juridical Standard for an Unruly Problem*, 19 DE PAUL L. REV. 217 (1969).

tribunal. In addition, an international tribunal would be more concerned with balancing the interests of individual states against the standard of international equity and order than with the momentary interests of any one nation.¹⁰⁴ However, individual nations would retain the right to grant political asylum and thus the possibility of international friction would remain. Indeed, it is conceivable that a state's decision to grant asylum could spark even greater friction when it is taken despite the pronouncement of an international tribunal.

These proposals fail either to solve or to provide an alternative to the problem of defining a political offense in a way that distinguishes it from terrorism.

VII. Toward a Functional Test for the Existence of a Political Uprising

Cases will inevitably arise in which terrorism and rebellion cannot be distinguished except through clarification of the term "political uprising." The immediate task is to develop an analytical framework that facilitates this distinction and that reconciles the fundamental purpose of extradition, the return of criminal suspects to justice, with the purpose of the political offense exception, the preservation of neutrality in foreign relations. Toward this end, this article proposes adoption of a "functional test," consisting of a three-stage analysis, for determining the existence of a political uprising.¹⁰⁵

104. For a discussion of the importance of this consideration in international decision making, see M. McDUGAL, H. LASSWELL & L. CHEN, *HUMAN RIGHTS AND WORLD PUBLIC ORDER* 83 (1982).

105. The purpose of a functional test should be to distinguish between the two ubiquitous forms of modern political violence — "terrorism" and politically-based guerrilla warfare — so that the former falls outside and the latter within the political offense exception. Contrary to the admonition that one man's terrorist is another man's freedom fighter, it is possible to make the distinction in a functional rather than a normative manner.

See, e.g., M. STOL, *THE POLITICS OF TERRORISM*, chapter 4 (1979) for the argument that one characteristic of terrorism is that terrorist movements enjoy little popular support among the citizenry and control insufficient resources to win outright political or military victory. Terrorist movements attempt to undermine governmental authority through clandestine and sporadic operations against the social structure of a society. Terrorist tactics may be designed to demonstrate the government's inability to maintain order, discourage high visibility service in the government, provoke indiscriminate governmental repression in hopes of stimulating discontent, disrupt the economy, publicize a message, or otherwise create instability.

This is not to suggest that any movement that does not neatly fit the pattern of terrorism should necessarily be considered a rebellion or political uprising. Recognition of the essential characteristics of terrorism does, however, underscore the need to assess the relation between the proclaimed goals of a violent political movement and the claims made in the larger society.

Political Offense Exception

Stage I.

The first stage is familiar and directs inquiry into the offender's political objectives. The court should identify the cause for which the accused purports to have acted and determine whether he acted as a member of an organization seeking to advance that cause. The court should then appraise whether the movement is fundamentally incompatible with either the system of government within the requesting state (or with the leadership), and whether the movement seeks to seize political control of the state. Only claims to assume political control of the state or claims to self-determination should be considered adequate to support the finding that a political uprising exists.

Stage II.

The second stage asks whether a concordance or identity exists between the cause of a revolutionary organization and claims consistently asserted by larger societal elements. A "larger societal element" is an ethnically, religiously, demographically, economically, or culturally recognizable and cohesive interest group that is a significant participant in the shaping and sharing of values within the society. The relevant question at this stage is not how many but who asserts the claim.

Although the tendency of recent decisions is to place the burden of proof on the accused to establish the elements of the political offense exception, judicially discoverable and manageable standards exist to guide the courts in appraising the accused's efforts to identify these societal elements and to explain their claims. Evidence of a clear international consensus regarding the claims and representative status of parties to the conflict should be considered relevant when two conditions are satisfied: first, the consensus pertains not merely to an abstract norm but to the particular conflict at issue; and second, the consensus is expressed either in binding international law or by bodies, such as the United Nations General Assembly, that are highly representative of the world community.

In the absence of a clear international consensus, judges' impartiality in evaluating the evidence will be of paramount importance. The parties may offer evidence pertaining to cultural and historical antecedents of the conflict and to the level of cooperation between the revolutionary organization and the larger societal elements. The State Department's analysis might be represented *in camera* and political scientists and foreign correspondents can serve as expert witnesses.

Stage III.

The third stage inquires whether the larger societal elements with whom the accused and his organization identify may reasonably be said to endorse or condone the use of force to achieve their goals. Such an inquiry is necessary because, even though larger societal elements may share the ultimate goal of a revolutionary organization, they may pursue alternative strategies, such as negotiation, for implementation. Inevitably, this inquiry must resort to circumstantial evidence and common sense. Several factors might be considered. First, the nature of the claim: is the claim so antithetical to the *status quo* that force is the most likely strategy? Second, the history of the conflict that the claim underlies: has there been movement and reconciliation, or is there a clear pattern of retrenchment and conflict? Has the government made political prisoners out of the revolutionary leadership? Third, the history of violence attending the political conflict: has the governmental response to the assertion of the claim been violent? Have nonviolent activities such as strikes or demonstrations been permitted? Has there been a discernible escalation in the level of violence? Have other independent paramilitary groups sprung up?

There is unavoidable difficulty in answering these questions. Ultimately, the functional test is an analytical framework rather than a set of rigid rules. It offers an approach for thinking about the issues raised in determining the existence of a political uprising and for resolving these issues in a manner consistent with the policies behind international extradition. The approach is useful to the extent that it facilitates organization and comprehension of the facts of a particular conflict. However, it must be emphasized that the functional test is not the end of the political offense inquiry. Even assuming the existence of a political uprising, the Swiss test for determining whether a violent act was necessary or proportional to the goals of a revolutionary movement must be applied. Finally, courts should recognize that, in extraordinary cases, any formulation of the political offense exception must defer to compelling foreign policy concerns.

Conclusion

This article has argued that the political offense exception is not an outdated relic of a simpler age. Neutrality in foreign rebellions, to the extent of refusing to deliver belligerents into the hands of their enemies, remains sound policy in the contemporary world community. The political offense exception does not require a determination of which party in a political controversy is more just; rather, it preserves the integrity of

Political Offense Exception

international extradition as a mechanism to bring common criminals to justice. Judicial involvement inhibits political manipulation of the mechanism and affords a measure of procedural fairness to the accused. This involvement has had no discernable adverse effect on the conduct of United States foreign policy. Therefore, the difficulty in dealing with modern political violence does not call for sweeping change, but can be solved through development of the existing jurisprudential approach.

The functional approach recognizes the necessity of refining the political uprising component of the incidence test. There is no other way to distinguish rebellion from terrorism. The functional test suggested here would require an examination of the goals of a revolutionary organization and of the place of those goals within the larger society. Such an exercise is not normative, but functional, and does not imply approval or disapproval.

In the final analysis, adoption of a functional test will depend on the ability of the courts to develop the analytical framework to assess realistically the concordance between the goals of a revolutionary movement and the claims asserted in the larger society. This is no simple task since the assessment must adhere to evidentiary norms. The framework suggested in this article may provide a useful starting place, but the actual development awaits courageous and innovative representation by practitioners and similarly creative balancing of considerations by judges.

